Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1772

CHAIM KAHAN,
SOLOMON WERCBERGER
AND
MOR WERCBERGER,
Petitioners

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

	Pages
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT	2
A. The Evidence	3
B. The District Court's Ruling	5
C. The Court of Appeals' Decision	6
REASONS FOR GRANTING THE WRIT	7
CONCLUSION	14
APPENDIX A	1a-25a
APPENDIX B	26a-28a
APPENDIX C	29a-30a
APPENDIX D	31a
APPENDIX E	32a-33a

TABLE OF AUTHORITIES

Cases: Page

Aguilar v. Texas.
378 U.S. 108 (1964) 11

Andresen v. Maryland.
427 U.S. 463 (1976) 9

Franks v. Delaware.
No. 77-5176, *cert. granted.*
98 S.Ct. 261 (Oct. 11, 1977) 8

Spinelli v. United States.
393 U.S. 410 (1969) 9, 11, 13

United States v. Astroff.
556 F.2d 1369 (5th Cir.) *rehearing en banc granted.* 564 F.2d 199 (1977) 7-8

United States v. Carmichael.
489 F.2d 983 (7th Cir. 1973) (*en banc*) 7, 8

United States v. Galante.
547 F.2d 733 (2d Cir. 1976)
cert. denied. 431 U.S. 969 (1977) 13

United States v. Harwood.
470 F.2d 322 (10th Cir. 1972) 7, 10

United States v. Hole.
564 F.2d 298 (9th Cir. 1977) 8

United States v. Karathanos.
531 F.2d 26 (2d Cir.)
cert. denied. 428 U.S. 910 (1976) 13

United States v. Luna.
525 F.2d 4 (6th Cir. 1975)
cert. denied. 424 U.S. 965 (1976) 8

United States v. Marihart.
492 F.2d 897 (8th Cir.)
cert. denied 419 U.S. 827 (1974) 8

Page

United States v. Morris.
477 F.2d 657 (5th Cir.)
cert. denied. 414 U.S. 852 (1973) 10

United States v. Park.
531 F.2d 754 (5th Cir. 1976) 8

United States v. Pond.
523 F.2d 210 (2nd Cir. 1975)
cert. denied. 423 U.S. 1058 (1976) 8

United States v. Roth.
391 F.2d 507 (7th Cir. 1967) 10, 11, 12

United States v. Ventresca.
380 U.S. 102 (1965) 12

United States v. Viggiano.
433 F.2d 716 (2d Cir. 1970)
cert. denied. 401 U.S. 938 (1971) 13-14

Vitali v. United States.
383 F.2d 121 (1st Cir. 1967) 13

Whiteley v. Warden.
401 U.S. 560 (1971) 10, 11, 13

Zurcher v. Stanford Daily.
46 U.S.L.W. 4546 (May 31, 1978)
(No. 76-1484, together with 76-1600) 9

Statutes:

18 U.S.C. § 371 3

18 U.S.C. § 659 3

28 U.S.C. § 1254(1) 2

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OPINIONS BELOW

The opinion of the court of appeals (Appendix A., pp. 1a - 25a, *infra*)[1] is reported at 572 F.2d 923.[2] The Memorandum and Decision of the District Court of July 6, 1976 (Appendix B., pp. 26a - 28a, *infra*), is unreported.

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[1]All appendices to this petition will be cited as "pp. ____a. *infra*." The "Appellants' Appendix" filed in the court of appeals will be cited as "AA.____."

[2]The panel that originally heard this case was District Judge Dooling, Circuit Judge Webster (8th Cir.) and Circuit Judge Van Graafeiland (2d Cir.). Judge Webster resigned before the panel's opinion was rendered.

JURISDICTION

The opinion and judgment of the court of appeals were filed on March 7, 1978. A timely petition for rehearing and suggestion for rehearing *en banc* were denied on May 15, 1978 (Appendices C and D, pp. 29a - 31a, *infra*). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether an FBI Agent's unintentional, but negligent, false statement of a material fact in an affidavit for a search warrant invalidates the search.

2. Whether an affidavit which states that "several thousand" cartons of commonly sold Schick razors were seen at a warehouse in New York on the day following a hijacking of the same kind of Schick razors in New Jersey constitutes probable cause for search of the warehouse.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

The petitioners are three individuals who operated the "CBS Warehouse" located in Brooklyn, New York. After a jury trial in the United States District Court for the Eastern

District of New York, petitioners were convicted on one count of knowingly possessing stolen goods moved in interstate commerce in violation of 18 U.S.C. § 659. They were acquitted on a count charging conspiracy to receive those goods in violation of 18 U.S.C. § 371. None of the petitioners had any prior criminal record, but all have been sentenced to three years' imprisonment.

A. The Evidence

On March 11, 1975, a tractor-trailer en route from Connecticut to California with 6,910 cartons of Schick razors and other toiletries was hijacked in New Jersey. Two days later — on March 13, 1975 — a Special Agent of the FBI applied for a warrant to search the CBS Warehouse on the ground stated in his affidavit (Appendix E, pp. 32a - 33a, *infra*) that he had:

> reason to believe that there is presently being concealed in the above-described premises a quantity of cartons bearing the name Schnick, Inc., with the Spec. No. 02-40 on the said cartons which cartons have been stolen from Interstate Commerce in violation of Title 18, United States Code, Section 659.[3]

The facts stated to support this conclusion were as follows: First, it was asserted that the FBI had received a report of the hijacking of a tractor-trailer in New Jersey and that the person making the report "further advised taking from the trailor [*sic*] 6,910 cartons of Schnick razors and toilet products" which were being shipped in interstate commerce. The affidavit went on to say in a second numbered paragraph, that a "reliable confidential informant" who had previously supplied reliable information (p. 33a, *infra*):

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[3] "Schick" was misspelled "Schnick" throughout the affidavit.

> has stated, that he was in the above-described premises known as CBS Warehouse on March 12, 1975. While in the above-described warehouse the reliable informant observed several thousand cartons of Schnick super two bonded razors bearing the Schnick, Inc., Spec. No. 02-40 on the cartons.

The search warrant was issued on the basis of this affidavit on March 13, and FBI agents seized cartons of Schick products from the warehouse during a search made on that day. It was discovered subsequently that the "Spec. No. 02-40" was not an identifying number designating a particular shipment but was, as the district judge found, "the manufacturer's code number designating the type of goods packaged in the carton (i.e., Schick II razors and blades)." (Appendix B, p. 26a, *infra*) On this basis, petitioners moved before trial for suppression of the cartons seized in the warehouse on the ground that the affidavit — which was the *only* evidence submitted to the magistrate who issued the warrant (AA. 125a, 149a) — was totally insufficient to establish probable cause. The district judge noted initially that there was no challenge to "the reliability of the supplied information." (p. 27a, *infra*) Even though there was no evidence whatever in the affidavit that tied the cartons found at the CBS Warehouse to the hijacking on the previous day and the products described were "so common that they 'could be observed in hundreds of thousands of places throughout the United States on that same day,'" the judge held that the presence of "several thousand" cartons of Schick razors in a warehouse on the day following a hijacking was "extraordinary." (p. 27a, *infra*) On this account, the district judge found that there was probable cause to believe that "the goods seen by the informant were likely to be the goods stolen the previous day," and he denied the motion to suppress (pp. 27a - 28a, *infra*).

On the eve of trial, the prosecutor disclosed that the "supplied information" had not been accurate and that the

informant had, in fact, not seen any goods in the CBS Warehouse on March 12 because he had not been in the warehouse on that day. The facts developed at a hearing were as follows: On March 12, the "reliable informant," Paul Pollari, had called FBI Special Agent Pecoraro, to whom he had previously supplied information, and told Pecoraro that he had driven a rented truck filled with Schick razor products to the S&F Warehouse, a totally different warehouse in Brooklyn, with which petitioners had no relation (AA. 309a, 325a - 327a, 329a - 330a). Pollari had been told by a confederate in the scheme that another truck, loaded at the same time with Schick products, was being delivered by someone else to the CBS Warehouse (AA. 309a, 317a, 318a, 325a - 327a, 330a). It was on the basis of the information in this telephone call that the application for the warrant was made, and that it was erroneously stated to the magistrate that the informant had been inside the warehouse on March 12.

It developed at the hearing that as a result of the informant's oral report to Special Agent Pecoraro, the CBS Warehouse was placed under surveillance on the morning of March 13. The waiting agents watched as products were being unloaded into the warehouse at about noon on that day.[4] When the search warrant arrived in the afternoon, they entered the warehouse, seized cartons of Schick products, and also took possession of relevant documents supplied by the petitioners (AA. 192a - 193a, 260a, 268a).

B. The District Court's Ruling

While noting that the affidavit had been erroneous, and that the informant had not been present at the petitioners'

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[4]No evidence relating to the surveillance was presented to the magistrate in the application for a warrant. The affidavit reflected only the information regarding the activities of March 12.

warehouse on March 12, the district court ruled that the search warrant was valid because the inaccuracy had been immaterial. The judge reasoned that the misstatement was "unimportant" since the informant "knew [that] part of [the load of cartons] was going to . . . CBS [petitioners' warehouse], and that would be delivered the next day." (AA. 268a - 269a) The Court responded to assertions by petitioners that the error had been negligent by declaring (AA. 418a):

> Under the pressure of time that Mr. Pecoraro testified to, if we talk about the standard of negligence that usually applies . . . the agent was not negligent . . . . I certainly find that both agents did act reasonably, and Agent Colgan [who received and filed Pecoraro's oral application] misinterpreted the statement . . . and I would think that that's the way I would interpret it, and yes, that is the information he had gotten from Pecoraro in transmitting what Pollari had told him.

C. The Court of Appeals' Decision

Affirming the petitioners' conviction, the court of appeals held that the affidavit on its face was sufficient because, apart from the specification number, a finding of probable cause might have rested upon the report that petitioners' warehouse contained "several thousand Schick cartons" which the informant had observed on the day after the hijacking (Appendix A, pp. 12a, *infra*). The court of appeals also upheld the district judge's ruling that the misrepresentation in the affidavit did not invalidate the search warrant. It noted without comment the trial court's determination that the error was reasonable and asserted that "[t]he record requires the conclusion that the misstatement was not intentional." (p. 16a, *infra*) The

Court distinguished previous decisions in the same circuit by saying that they could not (p. 17a, *infra*):

> be read as intimating that materiality alone in a misstatement will invalidate a warrant absent negligence or, very likely, something going beyond simple negligence.

The court also concluded that the mistake was immaterial because, although the informant had not seen the cartons in petitioners' premises as stated, "[t]he critical content of the statement was that part of the March 12th delivery went to S&F and part to CBS, and Pollari was a competent informant on the program that he was helping to execute." (p. 17a, *infra*)

REASONS FOR GRANTING THE WRIT

1. There is a conflict among circuits regarding the proper standard.

The decision of the court of appeals conflicts with the approach taken by other circuits to the same issue of material misstatements of fact in affidavits supporting search warrants. Since first permitting criminal defendants to challenge the accuracy of affidavits underlying search warrants,[5] courts of appeals have struggled to decide when a demonstrated misrepresentation should result in the invalidation of a warrant. One ongoing controversy relates to the state of mind of the affiant who utters the misstatements. Circuits have differed over whether it is appropriate to overturn a warrant when material error in the supporting affidavit was neither intentional nor the result of recklessness on the part of the police. *Compare United*

[5] *See, e.g., United States v. Carmichael*, 489 F.2d 983 (7th Cir. 1973) (en banc); *United States v. Harwood*, 470 F.2d 322 (10th Cir. 1972).

States v. Astroff, 556 F.2d 1369 (5th Cir.) *rehearing en banc granted*, 564 F.2d 199 (1977) (negligent misrepresentation invalidates warrant), and *United States v. Park*, 531 F.2d 754 (5th Cir. 1976) (invalidating warrant where "honest mistake" in affidavit), *with United States v. Carmichael*, 489 F.2d 983 (7th Cir. 1973) (*en banc*) (warrant only tainted by reckless or intentional falsehood), *and United States v. Marihart*, 492 F.2d 897 (8th Cir.), *cert. denied*, 419 U.S. 827 (1974).[6] Divergent resolutions of this issue have generated confusion and disparities from one circuit to the next in the degree of constitutional relief afforded for searches predicated upon falsehoods. By ruling that a search warrant remains valid if the record shows nothing "beyond simple negligence" (p. 17a, *infra*) in making an affidavit, the Second Circuit has further tangled this constitutional thicket, and rendered a decision that adds to the uncertainty in that circuit and elsewhere. *Compare, e.g., United States v. Pond*, 523 F.2d 210, 213-214 (2d Cir. 1975), *cert. denied*, 423 U.S. 1058 (1976).[7]

Whether one views the error made in this affidavit as "simple negligence" or something more, it is important that recurrence of this kind of error be prevented if the critical constitutional safeguard of the magistrate's judgment is to retain practical value. Recent decisions of this Court have highlighted the importance of the warrant

[6]Accord, *United States v. Luna*, 525 F.2d 4 (6th Cir. 1975) *cert. denied*, 424 U.S. 965 (1976); *United States v. Hole*, 564 F.2d 298 (9th Cir. 1977).

[7]The issue in *Franks v. Delaware*, No. 77-5176, *cert. granted*, 98 S.Ct. 261 (Oct. 11, 1977), is whether challenges to the accuracy of affidavits are permitted. But the general question of relief for any demonstrated inaccuracies is implicated in the *Franks* case. Indeed, the issue of what standard of culpability should predicate invalidation of a warrant founded on a misrepresentation has been raised in *Franks* and extensively briefed by the Solicitor General as *amicus curiae* (Brief for the United States as Amicus Curiae, 8-9, 21-30) and has also been addressed by the parties (Brief for Respondent, 16-17; Reply Brief for Petitioners, 4-8).

process and have warned that when searches implicate First Amendment interests, Fourth Amendment safeguards must be "properly administered" with "particular exactitude." See *Zurcher v. Stanford Daily*, No. 76-1484 (decided May 31, 1978); compare *Andresen v. Maryland*, 427 U.S. 463 (1976). These decisions reflect increasing reliance upon the meaningfulness of the protection provided for privacy and other important constitutional interests by the judicial warrant. The realization of that goal requires substantial deterrence for material misstatements of fact whenever any culpability whatever can be proved.

Here there was negligence when the FBI Agent failed to ask the informant, *at any time* during their two conversations (AA. 261a - 263a), to clarify the circumstances of the latter's purported observation of the stolen goods in the petitioners' warehouse. Even the gentlest probing by the agent in his discussion with his informant would have revealed that the informant had not actually participated in any delivery to the petitioners warehouse. A police officer receiving information from a tipster may not be required to verify the informant's account independently, but he should at least undertake an effort to probe his source for the basis of his account before making any categorical representations to a magistrate. Without that effort, there is a serious possibility that the magistrate will be misled when he decides whether to credit an informant's report. See *Spinelli v. United States*, 393 U.S. 410, 416 (1969).

As it stands, the district court's judgment that the agent in this case behaved reasonably will encourage other agents to avoid raising troublesome questions when they receive favorable tips from informants; both informant and agent will avoid asking each other questions which might reveal undesirable details.

Indeed, this Court's view of the search warrant procedure would justify imposition of a rule that would invalidate any warrant-authorized search based upon a mis-

representation of fact — irrespective of culpability — so long as the misrepresentation was material. In this way, officials seeking warrants would have the greatest incentive to determine accurately the facts they are representing to the judicial officer.

On the question of materiality of the misstatement, the courts below were plainly in error. The *only* basis for crediting the information transmitted to the FBI Agent who was the affiant was the statement in his affidavit that the informant "was in the above-described premises known as CBS Warehouse on March 12, 1975," and that he there saw cartons similar to those which had been hijacked. Indeed, the court of appeals found that the affidavit was sufficient because (p. 12a, *infra*):

> the affiant recited as the basis of the informer's statement the informer's presence in the warehouse and his observation of the Schick products; these factors made the informer a competent witness of the facts he reported.

Under these circumstances, it was surely inconsistent for the court of appeals thereafter to conclude that it was immaterial whether or not the statement regarding "the informer's presence in the warehouse and his observation of the Schick products" was truthful. The proper test for materiality is to purge the affidavit altogether of the false statement and then to determine its sufficiency to show probable cause. *United States v. Morris*, 477 F.2d 657, 662 (5th Cir.), *cert. denied*, 414 U.S. 852 (1973); *United States v. Harwood*, 470 F.2d 322, 325 (10th Cir. 1972). Under that standard it seems entirely clear that if the affidavit had not included any reference to where the informer had purportedly been and what he had supposedly seen, there would have been nothing to connect the premises to be searched with the offense or the merchandise thought to be stolen. *See Whiteley v. Warden*, 401 U.S. 560, 567 (1971); *United States v. Roth*, 391 F.2d 507, 511 (7th Cir. 1967).

2. The decision of the court of appeals sustaining the sufficiency of the affidavit on its face conflicts with decisions of this Court.

The court of appeals' ruling sustaining the affidavit on its face conflicts with two well-established principles of this Court's Fourth Amendment jurisprudence, even apart from the misstatement of facts.

First, in testing the sufficiency of an affidavit to support a magistrate's probable cause determination under the Fourth Amendment, this Court has ruled that "an otherwise insufficient affidavit cannot be rehabilitated by testimony concerning information possessed by the affiant when he sought the warrant but not disclosed to the issuing magistrate." *Whiteley v. Warden*, 401 U.S. 560, 565 n.8 (1971). See *Aguilar v. Texas*, 378 U.S. 108, 109 n.1 (1964). Thus, "[i]f an affidavit is the only matter presented to the issuing magistrate, as in this case, the warrant must stand or fall solely on the contents of the affidavit." *United States v. Roth*, 391 F.2d 507, 509 (7th Cir. 1967).

Second, no affidavit can sustain a probable cause determination unless it sets forth information that links the premises to be searched (or the person to be arrested) to the particular crime thought to have been committed. See *Whiteley v. Warden*, 401 U.S. 560, 567 (1971); *Spinelli v. United States*, 393 U.S. 410, 418 (1969); *id.* at 423 (Mr. Justice White concurring).

Absolutely nothing on the face of the affidavit in this case linked the premises to be searched to the particular goods believed to be stolen!

First, respecting the goods stolen, the face of the affidavit says only that on March 11, 1975, 6,910 cartons of Schick razors and toilet products which were being shipped from Connecticut to California were hijacked.

Second, respecting the premises to be searched, the face of the affidavit says only that the informant, "[w]hile in the above-described warehouse [on 50th Street, Brooklyn, New York] . . . observed several thousand cartons of Schnick super two bonded razors bearing the Schnick, Inc., Spec. No. 02-40 on the cartons."

The court of appeals conceded that the specification number was of far less value for identifying purposes than might have first appeared (pp. 11a, 12a, *infra*). The court went on, nonetheless, to hold that probable cause had been demonstrated by the report that an informant had "seen several thousand Schick cartons in a Bush Terminal warehouse on the day following the highjacking of 6910 such Schick cartons." (p. 12a, *infra*) That finding was logically insupportable. The fact that the informant observed cartons in the petitioners' warehouse "on the day following the highjacking" implied nothing about the date on which the cartons were deposited at the warehouse. Since the cartons may have arrived weeks before they were observed by the informant, the date of his observation was irrelevant. The inference drawn from the large number of cartons seen in the warehouse was equally dubious. While the presence of a substantial quantity of goods in a private residence may be remarkable, there is nothing unusual about a warehouse which contains a great number of boxes and crates. Indeed, it would be surprising to find a warehouse containing any sort of product in less than considerable quantity. See *United States v. Roth*, 391 F.2d 507, 511 (7th Cir. 1967). And nothing in the affidavit suggests that the number of boxes was unusually high for a normal warehouse.

The court of appeals' finding of probable cause was not the result of a "commonsense" reading of the face of the affidavit. Compare *United States v. Ventresca*, 380 U.S. 102, 109 (1965). In light of the informant's failure to link the petitioners with the actual goods that were stolen, the affidavit could only have been read as indicating probable cause if the court itself supplied "essential details critical" to the determination. *United States v. Karathanos*, 531 F.2d 26, 31 (2d Cir.), *cert. denied*, 428 U.S. 910 (1976). In this respect, the instant case parallels the situation presented to this Court in *Spinelli v. United States*, 393 U.S. 410 (1969), where the Court rejected a finding of probable cause based on facially normal activity when "nothing alleged . . . would [have] permit[ted] the suspicions engendered by the informant's report to ripen into a judgment that a crime was probably being committed." *Id.* at 418; *see United States v. Galante*, 547 F.2d 733, 736 n.1 (2d Cir. 1976) (dictum), *cert. denied*, 431 U.S. 969 (1977). No matter how liberally an affidavit is to be construed, it cannot form the basis for a search warrant if it offers no information that tends to link the subjects of a search with evidence of a crime. *See Whiteley v. Warden*, 401 U.S. 560, 567 (1971).

Under the standard applied by the court of appeals, a magistrate could permit a warrant to issue to search any storage area known to contain a large, but normal, quantity of goods of a type and brand that have recently been stolen.

That is plainly not the law. Otherwise, the FBI could have searched all warehouses stocking Schick razors on the East Coast on the morning of March 13, 1975.

The two cases cited by the court of appeals to support its conclusion — *Vitali v. United States*, 383 F.2d 121 (1st Cir. 1967), and *United States v. Viggiano*, 433 F.2d 716 (2d Cir. 1970) *cert. denied*, 401 U.S. 938 (1971) — are inapposite. In *Vitali*, the First Circuit upheld a warrant based not only upon an allegation that a large quantity of goods had been observed on the property to be searched, but upon the assertion that the manufacturer of the goods only sold them to certain customers, of which the owner of the searched property was not one. Similarly, in *Viggiano*, inferences might have been drawn from an informant's observation

that a quantity of goods in a *residential garage and storage room* bore labels naming out-of-state addresses, and from the correlation between the dates of two hijackings and the dates when the defendant claimed to the informant to have "just purchased" the goods being held in the residential storage areas. 433 F.2d at 717. In neither case was a warrant sustained simply because the premises to be searched contained products of the same type or brand as the items stolen.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
For the Second Circuit

No. 1430 — September Term, 1976.

(Argued August 15, 1977 Decided March 7, 1978.)

Docket No. 77-1216

United States of America,

Appellee,

—against—

Chaim Kahan, Solomon Wercberger and Mor Wercberger,
Defendants-Appellants.

Before:

Van Graafeiland and Webster*, *Circuit Judges*
and Dooling**, *District Judge.*

The appeal is from a judgment of the United States District Court for the Eastern District of New York, Jacob Mishler, *Chief Judge,* convicting appellants, after a jury trial, of willfully and unlawfully receiving and having in their possession goods stolen from an interstate shipment of freight knowing the goods to have been stolen.

Affirmed.

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*Judge Webster (of the 8th Circuit, sitting by designation) having resigned, this decision is rendered by Judges Van Graafeiland and Dooling, who are in agreement, pursuant to the Rules of this Court, § 0.14(b).

**Of the Eastern District of New York, sitting by designation.

Milton S. Gould (Shea Gould Climenko & Casey), Ronald H. Allenstein and Lawrence B. Sutter, of Counsel, *for Appellants.*

Paul F. Corcoran (David G. Trager, United State Attorney and Bernard J. Fried, of Counsel), *for Appellee.*

Dooling, *D.J.:*

At about 9:00 P.M. on March 11, 1975, a Time D.C. tractor-trailer carrying 6,910 cartons of Schick products interstate was highjacked in Parsippany, New Jersey. On March 12th, 1784 cartons of the products were delivered to the S & F Warehouse, and 1673 (or 1654 or 1606) cartons were delivered to the CBS Warehouse, operated by the three defendants. On March 13th, at least 3,032 of the Schick products were delivered to CBS warehouse. Agents of the Federal Bureau of Investigation watched the delivery, and, after it was completed, seized 5,072 cartons of the Schick products at the CBS warehouse under a search warrant obtained while the Agents had the warehouse under surveillance. The defendants have been convicted of unlawfully receiving and possessing 5,072 cartons of Schick products stolen from an interestate shipment knowing the same to have been stolen. They were acquitted of a count charging them with conspiracy to receive and have in their possession the cartons of Schick products stolen from interstate commerce.[1]

[1]The alleged co-conspirators were defendants Manuel V. Gomez, Stanley Diamond, Vincent (Jimmy) Santa and Frank Joseph Maloney. Stanley Diamond entered a plea of guilty to the conspiracy count. The case against Santa and Gomez was severed and they were tried on a superseding indictment with Joseph De Luca and James and Patrick De Fillippo. All five were convicted of guilty possession and conspiracy.

Appellants contend that certain declarations of an alleged co-conspirator made after appellants' arrest should not have been received in evidence, that evidence suggesting that they had received stolen property under similar circumstances five weeks earlier should not have been received, and that the evidentiary fruits of the search and seizure of March 13th should have been suppressed because the affidavit on which it rested was insufficient and rested on a material misstatement of fact.

The evidence was essentially simple. Carroll Bridgeforth, the driver of the Time D.C. tractor-trailer combination, testified that he and his co-driver James Lester picked up a trailer loaded with Schick products at the New Haven, Connecticut, terminal between seven and seven-thirty on the evening of March 11, 1975 to drive it to Winchester, Virginia en route to the shipment's ultimate destination in California. At about 9:00 P.M., near the junction of Interstate Route 80 with Route 287 in New Jersey, a car forced them off the road and three or four armed men highjacked the truck at gunpoint. Bridgeforth, kept in the highjackers' car until released, with Lester, in Staten Island near midnight, testified that he heard one highjacker say to the other at about 11:30 P.M. that "the buyer was well satisfied with the load."

Paul Pollari testified that at about 7:00 or 7:30 o'clock in the evening of March 11th, Jimmy De Fillippo telephoned him to say that he had "work" for Pollari in the morning. On the next morning Jimmy De Fillippo called for Pollari at his house at 7:00 or 7:30 o'clock. He had with him his brother Patty De Fillippo and Manny Gomez. The four drove together to a truck rental station in Brooklyn and rented two straight trucks and a van. Pollari and Gomez drove one truck, Patty De Fillippo the other truck, and Jimmy De Fillippo the van. They drove together to a trailer yard in Brooklyn in which there were about 30 to 40 trailers. One was a Time D.C. trailer parked midway in the yard, and not visible from the street. When Pollari, Gomez

and the De Fillippos reached the yard, Joe De Luca and Vinnie (Jimmy) Santa were already there. The Time D.C. trailer was opened and Pollari saw that it was packed to the back with razor blades. One of the rented trucks was backed up to the trailer and Santa, De Luca, the De Fillippos and Pollari loaded both the rental trucks full from the trailer. Santa sent Pollari and Gomez with their truckload to the S & F Warehouse on Flushing Avenue near the Navy Yard with a sketchily filled out "Shipping Order" copy of a bill of lading not indicating any carrier, but reciting that the goods had been received at Clinton, Connecticut from Schick and were "Consigned to International Trading Co.," at the "Destination S & F Warehouse," by the "Route Building 77," and naming as the "Delivery Carrier — Brooklyn Navy Yard." The description of the article was "Razors & Blades" followed by "Hold for Shipment." There was no shipper or carrier signature on the document. When Santa sent Pollari and Gomez to S & F Warehouse, he told Pollari, who had expected to go with Jimmy De Fillippo, that De Fillippo was going to CBS with the other rented vehicle. Gomez and Pollari drove to the S & F Warehouse and unloaded their truck until about 5:30 in the afternoon; they then left with about a quarter of the load still on the truck.[2] Pollari and Gomez drove back to the lot, found Santa and De Luca there, and refilled the rented truck they were driving from the Time D.C. truck. The De Fillippo brothers had not yet returned. Santa instructed Pollari and Manny to park their loaded truck at Gomez's house overnight and to go to CBS the following

[2]The FBI recovered 1784 cartons of Schick products from S & F warehouse on March 13, 1975, together with the shipping order copy of the bill of lading identified by Pollari.

morning. That evening Pollari called Special Agent Pecoraro of the FBI and informed him of what was going on.[3] The next morning Gomez and Pollari drove their loaded truck to the CBS warehouse in Brooklyn. There the three defendants came out, looked into the truck, supplied the truckmen with skids, and showed them how to stack the cartons so that they would not fall. Later the De Fillippos arrived with Schick products and they too were unloaded and all the Schick cartons were taken by fork-lift truck and elevator into the CBS warehouse. The unloading of the truck and vans was not completed until 3:00 or 4:00 o'clock in the afternoon. The rented vehicles were returned and then Pollari and the De Fillippos went to the house of "Tommy Reel" and there met De Luca, Santa and one Stabino. Santa then told Pollari that "the FBI had hit the place, CBS, ten minutes after we left," but, said Santa, "we have nothing to worry about, it's on their end." Santa then paid $700 to Pollari and each of the De Fillippos.

The CBS warehouse had been under FBI surveillance from about nine o'clock on the morning of March 13. The Special Agents had learned of the Time D.C. theft by teletype on March 12, 1975, and had specification numbers of the products that had been on the trucks. They observed the Schick products being unloaded from the rented trucks and saw the defendants receiving the stolen goods; they could see that products being unloaded were Schick products, and Agent Pecoraro knew and recognized Pollari and Gomez. While the Special Agents were watching the delivery of the Schick products, a search warrant was obtained and the Agents executed the warrant. 5072 cartons of Shick products from the Time D.C. truck were located on the premises. Defendants Kahan and Mor Wercberger were to some extent interviewed. Defendant Kahan said that he had documents for the 1673 cartons of Schick

[3]Pollari had been working with Special Agent Pecoraro as an informer for a "couple" of years.

products received on March 12th and Mor Wercberger produced a uniform straight bill of lading for 1654 packages of "Razors and Blades". The bill of lading differed from the one Santa had given to Pollari to cover the S & F delivery on the preceding day only in reading "Destination c/o CBS Warehouse, Route Foot of 50 *St*" rather than "Destination S & F Warehouse, Route Building 77", and in reciting receipt of 1654 packages. Defendant Mor Wercberger also produced a CBS form of bill of lading, a copy of which, he said, he had issued to the truckman on March 12, 1975. It recited that an unnamed carrier had received from CBS Warehouse, Inc. "1 load blades" consigned to "INT Trucking"; it was signed by defendant Mor Wercberger.

No carrier document purported to cover the receipt by CBS of 3,032 cartons of Shick products on March 13th. Mor Wercberger produced the original of a straight bill of lading on the CBS form, reciting an unnamed carrier's receipt from CBS of "3032 car.", described as "3 loads" consigned to "Int'l Trucking".

Further documents related to the March 12th delivery included an unsigned handwritten receipt on a CBS form which recited the receipt from an unnamed person of 1606 cartons of Schick products, a signed typewritten receipt form of CBS Warehouses, Inc., dated March 13th, for 1606 cartons of Schick products received for account of International Trucking Co., and typewritten inventory cards covering the 1606 cartons. However, nothing was produced for the 3,032 cartons delivered on March 13th except the incomplete straight bill of lading on the CBS form. Neither defendant Kahan nor defendant Mor Wercberger could identify International Trading Company; Mor Wercberger said that he was not familiar with the company and had never before done business with it. After his arrest, Mor Wercberger produced from his wallet a statement of Tereza Merchandising Corp. (unrelated to the present case) on the

back of which there was a handwritten list of 3,290 cartons of Schick products. Mr. Wercberger testified that he made up the list on the loading dock at CBS on March 13th before the drivers left, but did not put the descriptive detail of the list on the bill of lading form because truckmen are interested only in getting a receipt for the right number of packages. The numbers on the list and on the bill of lading form, however, are not in agreement.

The cartons of Schick products delivered on March 12th and 13th to the S & F and the CBS warehouses were returned to Time D.C. and by Time D.C. were returned to Warner Lambert, the manufacturer of the Schick products. The Warner Lambert return record accounts for 6905 of the 6910 cartons that had been on the highjacked truck; seven cartons were recorded as retained by the FBI. The evidence was that the manufacturer's cost of the product was over $81,000 and its invoice price to the trade was over $248,000.

Five weeks earlier the FBI had visited CBS in connection with a report that goods allegedly stolen from Whitehall Laboratories were in the CBS warehouse. A Special Agent testified that on February 4, 1975, after the FBI had been advised of the Whitehall theft, agents of the FBI went to the CBS warehouse, advised Mor Wercberger that part of the stolen Whitehall products were believed to be located in the CBS warehouse, and he requested and received his permission to search that warehouse for the Whitehall products, and found a large quantity of them. Mor Wercberger supplied to the FBI the shipping order copy of a handwritten bill of lading; again, the instrument gave no carrier's name and recited that the products had been received at an unindicated place on "2-1-1975" from "Whitehall Labs. Inc.", "Consigned to A. Perez, Destination San Paulo, Brazil, Route C/O C.B.S. Warehouse Foot of 50 St. Brooklyn, N.Y.". "Delivering Carrier" line was blank. The form was dated "2/3/75" in the space provided for describing the articles shipped; it

listed 976 packages of Whitehall products.[4] The delivery arrived at CBS on February 3, 1975, Mor Wercberger testified, and the consignee, A. Perez, was unknown to him.

The Government showed that Whitehall Laboratories had shipped a large quantity of Anacin, Dristan and other products via National Farms Lines from its Hammonton, New Jersey, plant, to its Dallas, Texas, warehouse on January 30,1975. The shipment comprised 2,250 cases of proprietary drugs and toilet preparations weighing 36,804 pounds. The shipment did not reach Dallas, Texas. The Whitehall products were taken from the CBS warehouse on February 5, 1975 under a search warrant with the consent of defendants. All the packages seized from CBS, except five packages retained by the FBI, were returned to Whitehall on February 6, 1975, by the FBI through Laurel Hill Trucking Company.

Mor Wercberger testified that the original of the Whitehall bill of lading was never presented to CBS, and the goods allegedly consigned to A. Perez were never demanded from CBS by anyone — other than the FBI.

The Government produced the evidence of a handwriting expert that the bill of lading covering the Whitehall products allegedly consigned to A. Perez, the bill of lading covering the 1654 packages of razors and blades consigned to International Trading Co. c/o CBS Warehouse and the bill of lading covering 1784 razors and blades consigned to International Trading Co. at S & F Warehouse were all written (or printed) by the same hand, as was an exemplar furnished as being that of one Frank Joseph Maloney.

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[4]The 976 cases of seven product varieties listed on the "A. Perez" shipping order corresponded to the entire number of seven of the product items on the Whitehall transfer invoice; that is, the articles located at CBS included all of the Anacin, Neet and "Prep H" items on the transfer invoice, and included none of the remaining eleven items.

The Government showed through a witness from the car rental company that Manny Gomez had rented an automobile on March 10th and returned it on March 21st. The Time D.C. driver, Bridgeforth, said that the rental car resembled the highjackers' car. Bridgeforth had recalled that the car's license plate contained the numbers 538. The license plate of the car leased to Manny Gomez was 738 ZAO.

The defendants testified. Mor Wercberger testified that he was treasurer of CBS, that it had been in business for two years at the time in question, that Chaim Kahan was president and Solomon Wercberger was secretary of CBS and that Mor and Solomon Wercberger were brothers. Mor Wercberger testified that CBS did receive the shipments of Schick products on March 12 and 13, 1975, but did not know that the goods were stolen. He said CBS had been expecting from Tereza Merchandising Corp. a shipment, which would include razor blades of an unknown kind, in a quantity large enough to fit into a 20-foot container; that when the Schick products arrived, he figured they were from Tereza. Since the Schick products arrived as loose cartons, not palletized as Tereza's goods usually were, he said that he telephoned to Tereza while the Schick products were still being unloaded and complained about the mixture of stock styles. Tereza told him, Mor Wercberger further testified, that they were not to expect Schick products from Tereza but Wilkinson blades. Mor Wercberger testified that CBS did receive a Wilkinson blades shipment later. He testified that because the shipment contained only 1,606 cartons he refused to countersign the bill of lading, which listed 1,654 cartons. Instead, he said, he gave his own bill of lading form to the truck driver covering "1 load blades" without specification of any number of cartons. The inventory cards for the March 12 delivery, he said, were prepared on the morning of March 13 before the arrival of the FBI.

Mor Wercberger denied he or CBS purchased the Schick

products received on March 12th and 13th, and denied that he or CBS engaged in business as a dealer, wholesaler or retailer of goods. He testified that neither the consignee named in the instruments relating to the two deliveries of Schick Products nor anyone else came forward to demand the Schick products of CBS — other than the FBI.

Mor Werberger sought to explain his failure to draw any inference from the manifold irregularities in the documentation covering the Whitehall and Schick product deliveries by producing a number of other shipping documents that were, in one or another respect, imperfectly completed. They certainly demonstrated that there had been other instances of careless practice, but none exhibited the extremes of irregularity that characterized the deliveries of February 3rd, March 12th and March 13th, nor the marked differences between the number of packages delivered and number listed in the purported documentation, nor such a sequence of self-evidently suspicious deliveries as those of March 12th and March 13th. The last mentioned circumstance is particularly significant because Mor Wercberger and Chaim Kahan testified that they did not expect the March 13th delivery, even after the March 12th delivery was made.

The evidence amply supported the conviction on the substantive charge of receiving goods which have been stolen while moving as an interstate shipment of freight, knowing them to have been stolen. The appellants' contention is that the conviction is tainted by the admission of evidence that was timely objected to and should have been excluded.

1. It is argued that the motion to suppress the evidence seized on March 13th under the search warrant should have been granted because the affidavit upon which the warrant was granted was insufficient on its face and, in addition, contained a material misstatement of fact.

Chief Judge Mishler denied appellants' pre-trial motion in a written opinion. The affidavit, dated March 13, 1975, was made by Special Agent Patrick Colgan. It stated that

Colgan had reason to believe that there was concealed in the CBS warehouse a quantity of cartons bearing the name Schick, Inc., with the Spec. No. 02-40 on the cartons which had been stolen from interstate commerce. The supporting facts Colgan recited were (1) a report from Lester, a Time D.C. employee, that a Time D.C. trailer was highjacked on March 11, 1975 and 6910 cartons of Schick razors and toilet products were taken, which cartons were being shipped from West Haven, Connecticut to Anaheim, California and (2) that a reliable confidential informant (who had previously supplied information to the FBI which led to the arrest of one individual for theft of $75,000 worth of stolen merchandise and whose information also led to the recovery of approximately $25,000 of highjacked property and the arrest of two individuals in connection with that highjacking) had stated that he was in the CBS warehouse on March 12th and while there observed several thousand cartons of Schick super two-bonded razors bearing the Schick, Inc., Spec. No. 02-40 cartons.

The affidavit is sufficient if it is read as saying that the informant saw in the CBS warehouse the same cartons that the Time D.C. driver had reported as stolen from his truck on the preceding day. The argument made is that, concededly, "Spec. No. 02-40" does not identify particular lots of products but only a product variety, and, hence, it could not fairly be inferred that the cartons seen at CBS were those stolen on the previous day. But, as the Court said in *United States v. Ventresca*, 1965, 380 U.S. 102, 109. "The affidavit in this case, if read in a common sense way rather than technically, shows ample facts to establish probable cause and allow the [Magistrate] to issue the search warrant." Here, the affidavit is in the strongest possible form. It is based on the victim's description of the goods stolen from him and an eyewitness statement that he saw the described goods in the place to be searched. There is no contention that the informant, the affiant or the Magistrate had before them anything to make them suspicious that the

description lacked ultimate specificity. *Cf. United States v. Gomez Londono*, 2d Cir. 1977, 553 F.2d 805, 810-811. Had they noted the abstract possibility that the description "super two bonded razors bearing the Schick, Inc., Spec. No. 02-40 on the cartons" was not necessarily a precisely specific identification, the warrant must have issued on the probable cause implicit in a successful informant's report that he had seen several thousand Schick cartons in a Bush Terminal warehouse on the day following the highjacking of 6910 such Schick cartons. *Cf. United States v. Viggiano*, 2d Cir. 1970, 433 F.2d 716. Judge Aldrich pointed out, in *Vitali v. United States*, 1st Cir. 1967, 383 F.2d 121, 122 that

> "Where goods are of a common nature and not unique there is no obligation to show that the ones sought (here a substantial quantity of [Speidel] watch bands) necessarily are the ones stolen, but only to show circumstances indicating this to be likely."

United States v. Karanthanos, 2d Cir. 1976, 531 F.2d 26, does not point to a different conclusion. The seemingly small but, as the majority found, critically important defect in the affidavit was that the informer's statement to the affiant omitted to say how the informer learned (rather than surmised) that the aliens with whom he had been living and working had entered the country illegally: that is, the affidavit would have been sufficient if the affiant had said that the informer said that at least eight other persons working at the restaurant told him that they were illegal aliens rather than saying that the informer had said that "eight other persons known to him to be illegal aliens were employed at" the restaurant (531 F.2d at 30). The difference was precisely that between empty opinion and competent evidence. Cf. *Spinelli v. United States*, 1969, 396 U.S 410, 418, 423 (concurring opinion). Here, the affiant recited as the basis of the informer's statement the informer's presence in the warehouse and his observation of the Schick products; these factors made the informer a

competent witness of the facts he reported.[5] See *Spinelli v. United States, supra*, 393 U.S. at 419.

On the eve of trial the Government learned and advised opposing counsel and the court that the "informant" relied on in the affidavit — Pollari — had not been in or at the CBS warehouse on March 12th but on March 13th. Chief Judge Mishler thereupon conducted a hearing at which he heard the testimony of Special Agent Colgan, the affiant in the affidavit, and Special Agent Pecoraro, the Agent to whom Pollari reported on the evening of March 12th.

Pecoraro's testimony at the hearing was the following:

When his informant called him at 11:00 P.M. on March 12th, Pecoraro asked him if he had any knowledge of a tractor-trailer of Schick products that had been highjacked. The informant said "Peppi, we have the load." The agent asked, "Who has the load?" and the informant said, "Jimmy and Santa has it and I worked for him today unloading it." The Agent asked, "Where is the load now?" The informant answered, "It's on the location in Brooklyn. We took two loads out today, we took one to CBS Warehouse and took two to Brooklyn Navy Yard to S & F". Asked who was working with him, the informant said Jimmy and Patty De Fillippo and Manny Gomez, and he mentioned Joe De Luca, though not as one of the deliverers. The informant said also that on the next day he was going to take another load to CBS Warehouse. Pecoraro, with two other agents, met the informant the next morning; the informant reiterated that the Schick Products were being

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[5] *United States v. Roth*, 7th Cir. 1967, 391 F.2d 507, discussed in the Government's Brief, page 37, footnote 29, necessarily found insufficient an affidavit in which the affiant wholly failed to state the basis of the "information from a confidential informant that the electric blenders were . . . in the building" or the date as of which his "information" spoke. The affidavit rested, then, on a Special Agent's statement that he saw "a large number of boxes" bearing the brand name of the stolen blades through a window in a food store and warehouse complex.

unloaded from a Time D.C. trailer, that a portion of the load had gone to CBS and a portion to S & F and that he and his associates were going to deliver the remainder of the load to CBS. The informant had also said that he had seen the number 0240 on thousands of the Schick cartons. Pecoraro and agent Dowd went to CBS and at about 11:45 P.M. saw Pollari and Gomez arrive in the rented truck and unload Schick products to the CBS loading dock.

Pecoraro interpreted his informant's words as meaning that he had participated in the first CBS delivery on March 12th, and he discovered his error only on the Friday before the trial started. Pecoraro called Colgan twice on the morning of March 13th after taking up the surveillance of the CBS warehouse, first to alert him to stand by ready to apply for a warrant and, later, after observing the arrival of the rented truck and vans and the commencement of the delivery to the defendants-appellants, to ask Colgan to proceed to obtain the warrant, but he could not say that he told Colgan what he had been oserving at the CBS warehouse.

Special Agent Colgan's testimony at the hearing was the following:

Colgan was at the United States Attorney's office in the Eastern District at about 10:00 A.M. or 10:30 A.M. on March 13th when he received a telephone call asking him to stand by a telephone in connection with the continuing investigation of the Schick products highjacking a matter with which he was already familiar. At around 11:45 to 12:30 A.M. [P.M.] Agents Pecoraro and Dowd telephoned him. Pecoraro told Colgan that his confidential source had told him the night before and that morning.

> "that this confidential source had unloaded the trailer-load of Schick Products that he knew had been stolen in New Jersey."

Pecoraro informed Colgan of the matter related to the in-

formant's reliability. Colgan said that Pecoraro told him that

> ". . . the confidential source supplied him with the information that he, the source, had helped unload the stolen Time D.C. trailer containing the Schick products on a day also before March 13th. This informant also advised that he helped load a number of rented trucks with the Schick Products, and that these rental trucks went to two separate Brooklyn warehouses.
>
> ". . . that one warehouse was called S & F Warehouse and the other was CBS Warehouse, 50th Street and 1st Avenue in Brooklyn. Further, the informant advised that he had delivered on March 12th a shipment that did go to the CBS Warehouse, and also supplied one identifying number of Schick Products as 0240 as being in the cartons, a large number of the cartons delivered to CBS."

Agent Dowd, the case Agent, gave him background data on the case, and advised Colgan that he did not know that the number 0240 was particular to the stolen shipment. Colgan checked through the FBI office in New Haven and was advised that the number was definitely part of the shipment of Schick Products that had been highjacked in New Jersey.

On the basis of these data, Colgan signed the affidavit on which the warrant was granted. When he had the warrant, he went directly to CBS, a distance of three miles, arriving there about 4:00 P.M.

Colgan was the Special Agent who had been at CBS on February 4th in connection with the Whitehall Laboratories seizure, and he had that limited acquaintance with defendants Kahan and Mor Wercberger. The March 13th search at CBS under the warrant resulted in the seizure of the 5072 cartons of Schick products as well as in the production of the "documentation" relating to the deliveries of March 12th and 13th.

Colgan thought that the information in the affidavit was given to him before and did not relate to the delivery of March 13th, and that the informant had delivered part of the stolen shipment to CBS on March 12th and knew that another part of it had been delivered to S & F. Colgan did not hear anything to the contrary until about a week or ten days before the hearing. While he had spoken to Pecoraro and Dowd during the same telephone call at about midday on March 13th, he did not realize that they were on surveillance at CBS, nor did he learn that the March 13th delivery was under way and that the informant was participating in it. The Magistrate signed the warrant at about 3:30 P.M. or 3:45 P.M.; the evidence indicates that the March 13th delivery had been completed at that time.

Chief Judge Mishler denied the motion to suppress. He found that the affidavit was in error because of a misinterpretation of the informant's statement to Pecoraro. The error was considered unimportant because the informant's significant information was that he had the stolen load and that it was going in part to S & F and in part to CBS. It was concluded that the credibility of the informer and of the information he furnished had been shown. Defendants argued that the fact that the Agents' misstatement was innocent would not validate the warrant because their error was due to culpable negligence (cf. *United States v. Gonzales*, 2d Cir. 1973, 488 F.2d 833, 837-838), but the Court found that, under the pressure of time that Pecoraro testified to, he was not negligent but acted reasonably.

The record requires the conclusion that the misstatement was not intentional. Plainly, a correct statement either of Pollari's activities and observations on March 12th, including the arrangements for the delivery to CBS on March 13th, or of Pecoraro's and Dowd's observations on the 13th, or of both could not have weakened, but would have strengthened the affidavit; there was no occasion to mistate or conceal. The testimony of Colgan and Pecoraro reveals nothing that suggests any possible reason for making a

misstatement, and contains nothing that would support an inference that they were not frank with the court. Rather, the contrary is established by the manner in which they testified to the times at which Pecoraro reported Pollari's statements to Colgan and at which Colgan learned that Pecoraro and Dowd had the March 13th delivery under surveillance from beginning to end. Neither *Gonzales* nor *United States v. Pond*, 2d Cir. 1975, 523 F.2d 210, 213-214, can be read as intimating that materiality alone in a misstatement will invalidate a warrant absent negligence or, very likely, something going beyond simple negligence. See *United States v. Pond*, *supra*, 523 F.2d at 214 (". . . we agree that the most that can be said . . . is that the agent made the statement 'negligently.'")

The materiality of the statement must be examined from a second point of view. Ordinarily, if a material statement is wrong, the consequence is a material misstatement. But the disaparity between the statement made and the perfectly true statement may be immaterial as Chief Judge Mishler found it to be in this case. That is, the statement was not materially wrong. The critical content of the statement was that part of the March 12th delivery went to S & F and part to CBS, and Pollari was a competent informant on the program that he was helping to execute.

2. Defendants contend that the court should have excluded the evidence of the dealings with the Whitehall goods. The argument is that it was not shown that the Whitehall goods were stolen, and, if that was shown, there was no evidence that defendants received the Whitehall goods knowing them to be stolen.

The evidence was offered on the issue of defendants' knowledge that the Schick products were stolen property. The Government abundantly showed that the Whitehall products were stolen. *United States v. Leonard*, 2d Cir. 1975, F.2d 1076, 1090-1091, has made it clear that the "similar act" relied on as evidence of intent need be proved only by a preponderance of the evidence. The Government

bore its burden of proof when it showed that the Whitehall drugs were shipped to Whitehall's Texas warehouse from Connecticut and did not arrive, but were soon found in a Brooklyn warehouse under the shipping order copy of a bill of lading of an unnamed carrier consigned to "A. Perez" in Brazil, that the goods were taken by the FBI and returned to Whitehall, and that no one thereafter appeared, with or without the original "A. Perez" bill of lading, to demand the goods of CBS.

The Government did not have to show that the defendants knew when they received them that the Whitehall products were stolen. That has been settled in this district, so far as concerns a charge of receiving stolen goods knowing them to be stolen, since *United States* v. *Brand*, 2d Cir. 1935, 79 F.2d 605. See also *United States* v. *Baum*, 2d Cir. 1973, 482 F.2d 1325, 1330-1331; *United States* v. *Schaffer*, 2d Cir. 1959, 266 F.2d 435, 442; *cf. United States* v. *Seeman*, 2d Cir. 1940, 115 F.2d 371, 373; *United States* v. *Antrobus*, 3d Cir. 1951, 191 F.2d 969, 971. As *Leonard* pointed out, 524 F.2d at 1090-1091 (commenting on the contention that "similar acts" should be admitted only if proved by "plain, clear and conclusive" evidence):

> "This view appears to rest on a misconception. Similar act evidence is admitted to show willfulness and for other purposes, not because it may indicate the commission of crime but in spite of that . . . . While 'the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.' *In re Winship*, 397 U.S. 358, 364. . . . the 'fact' here is willfulness, not each subsidiary fact offered to establish it."

The function of the Whitehall evidence was to persuade the jury that, if a person has twice within a short time received a large shipment of stolen goods under strikingly similar circumstances (that is, similar "documentation," receipt within a day or two of the highjacking, absence of any later

demand for the goods by the supposed consignee, ignorance of the identity of the consignee) the supposition that the warehouseman did not know the goods were stolen is greatly weakened, and an inference of guilty knowledge is given strong support. As Judge Learned Hand said in *Brand* (79 F.2d at 606):

> ". . . the competence of such evidence does not depend upon conformity with any fixed conditions, such as upon direct proof of scienter, or the identity of the thief in the earlier instance, or of the victim, or the number of instances in which the accused received stolen goods, or the similarity of the goods stolen. These are all relevant circumstances but not necessary constituents. Nor can we see any basis for distinguishing between knowledge and intent in such cases. The judge must decide each time whether the other instance or instances form a basis for sound inference as to the guilty knowledge of the accused in the transaction under inquiry; that is all that can be said about the matter."

There was no error in the admission of the Whitehall evidence and the Court's instruction on it was more favorable to defendants than the law required it to be.

3. Appellants give great emphasis to the supposed error in admitting the testimony of an informer, Cogar, concerning declarations made by alleged co-conspirators after the defendants were arrested. The testimony, relevant to the conspiracy count, if admissible at all, was of the sort Judge Friendly commented on in *Leonard* (524 F.2d 1084):

> ". . . the prosecutor chose to imperil a good case by introducing a line of evidence that added little but was bound to be a prolific breeder of substantial claims of error. . ."

That the jury found the testimony valueless may well be the meaning of its verdict of not guilty on the conspiracy count.

Cogar, like Pollari, was an undercover informer from July

1974 until May 1975, working with federal agents other than those with whom Pollari was working. Neither Cogar nor Pollari knew that the other was an undercover informer. The theory on which the evidence was admitted was that the conspiracy embraced the receiving, possessing and paying for the Schick products, and not confessing or informing when arrested.

Cogar testifed that he knew Jimmy Santa, Stanley Diamond and Manny Gomez and on occasion met them at the dress shop of his father-in-law, and that on March 14, 1975, the day after defendants' arrest, while Cogar was at work in the shop Santa, Diamond and two others were present; Santa was reading a newspaper and then passing the paper to Diamond and pointing to a news item, he asked, "What do you think of the rabbis?" To this, Cogar testified, Diamond answered, "Don't worry, don't worry, they're stand-up people." Cogar said that he later looked at the article Santa had pointed to: its headlines related to the Schick highjacking. Later the same day, Cogar testified, he was at Tommy Reel's house to play cards and Santa and Diamond were also present. Diamond told him that the persons earlier referred to were not rabbis but Orthodox Jews[6] who wore black hats and beards; on the same occasion he heard Diamond tell Santa, referring to the "rabbis", "They're tough people, they won't get anything about of them." Cogar further testified that on March 19th at Tommy Reel's for a card game with Santa, his brother, Manny Gomez and Diamond, he heard Diamond ask Santa if he had got any more money and heard Santa answer that "he was going to see them, the rabbis, on Saturday about gettting the rest of the money." After Santa left the room, Cogar said that Diamond told him that not the Italians, as people supposed, but the Jewish people have all the money, and that the money "that they had received was brand new one hundred dollar bills with the wrappers that had the

[6]The evidence was that defendants were Orthodox Jews of a very strict sect.

Star of David on it." Cogar added that Diamond was referring to "the money that they had gotten from the rabbis." He said Diamond made other remarks, such as that the money was "buried and not in banks," that "the money could never be, you know, shown."

Cross-examination developed that in the period in question Cogar had become an informant to avoid prosecution for credit card fraud, was a paid informant, "earned" money unloading highjacked trucks and disposing of the goods with Santa, Diamond, and his father-in-law, but at the same time furnished information to the Government in all cases in which he helped with such unloading, and gathered intelligence information for the Government in the course of daily card games which the Government furnished him money to attend. Cogar testified that a few months before March 1975 he was addicted to heroin, but in March 1975 had become an occasional user of heroin, having started to use methadone "to come down."

Near the commencement of Cogar's testimony, the Court instructed the jury that it could not consider the conversations between Santa and Diamond made after defendants' arrest as evidence against defendants if they concluded that upon arrest defendants were no longer members of the conspiracy, and could consider the conversations as evidence against them only if they found that the defendants had become members of the conspiracy, that Diamond and Santa were members of the conspiracy and that the conspiracy continued through the dates of the conversations. In the final instructions to the jury the Court, after the general charge on conspiracy, explained the defense contention: that tne accused, if shown to have been conspirators, were not such after their arrest; emphasized that Diamond's statements could be considered only if the jury found as facts that the defendants and Diamond were members of the conspiracy; and that the Diamond declarations were made to advance the purposes

of the conspiracy, and that the declarations were made when the defendants were still members of the conspiracy. The instructions continued:

> "But, whether or not the defendants were members of the conspiracy or continued to be after their arrest, are fact questions for the jury. You take into consideration the purpose and object of the conspiracy, and you determine whether this was really a sale of the goods as the government contends and if it was the sale of the goods, whether payment for the goods was part of the purpose of the conspiracy, and whether they still were part of the conspiracy for those purposes. But, again I says, that is a fact question. If you find against the government on the issue and in favor of the defendants, that after the arrest the defendant could not have been part of the conspiracy, then whatever Diamond said even if he were a member of the conspiracy, cannot be charged against them, no longer an act, no longer a part of it. Of course, I caution you that you must also find from the evidence that Diamond was a member of the conspiracy. If he was not a member of the conspiracy then, of course, what he said cannot in any event be charged to these defendants."

Appellants argue first that the indictment did not charge a conspiracy that extended to appellants buying and paying for the Schick products and that, in the common case, a sale of stolen goods to one who knows they are stolen is not, without more, a conspiracy. However, an indictment need not allege every circumstance of a conspiracy so long as it unmistakably identifies the conspiracy charged. *Wong Tai v. United States*, 1927, 273 U.S. 77, 80-81. Here, moreover, the third overt act alleged in the indictment was the second of the Diamond conversations, though it is dated March 14th. The indictment thus disclosed the particular circumstance, but it charged conspiracy to receive and possess without adding conspiracy to buy. There was neither

variance nor surprise in presenting in support of the conspiracy to receive and possess evidence that the conspiracy embraced the further circumstance of payment, an obvious and expectable element although not charged as the gist of the conspiracy. See *United States v. Fischetti*, 5th Cir. 1971, 450 F.2d 34, 40; *Danielson v. United States*, 9th Cir. 1963, 321 F.2d 441, 443; *Medrano v. United States*, 9th Cir. 1961, 285 F.2d 23, 26.

The case is not one in which a simple sale of goods known to be stolen is charged as a conspiracy between seller and buyer, as in *United States v. Zeuli*, 2d Cir. 1943, 137 F.2d 845, which itself recognized that the "doctrine" is confined to the instance where the indictment charges or the proof shows no more than the sale transaction. More was charged here, and the evidence presented to the jury was not simply evidence of knowing receipt of stolen property. At the very threshold of the matter the appellants concerted their activities, innocent or guilty, in receiving and possessing the allegedly stolen property. Beyond that there was evidence that at least as early as 11:30 P.M. on March 11th, the night of the highjacking, a "buyer" — not necessarily appellants — had expressed satisfaction with the stolen property; appellants accepted the March 12th delivery, accepted the International Trading Company shipping order copy of the bill of lading, set up the internal inventory documentation, prepared in part the invoice to the "International Trading Company", received the second delivery from the same highjacking, and put into operation, when interrogated, the scheme of internal documentation keyed to the shipping order furnished by Santa and, it may be inferred, delivered by the De Fillippo brothers. See *United States v. Mayer*, 6th Cir. 1975, 512 F.2d 637, 647-648; *United States v. Cook*, 5th Cir. 1972, 461 F.2d 906, 910 (footnote 3); *United States v. Jackson*, 6th Cir. 1970, 422 F.2d 975, 977-978; *cf. United States v. Untiedt*, 8th Cir. 1974, 493 F.2d 1056, 1058-1059 [typographical error in citation corrected].

The argument that there was no evidence of appellants' complicity in a conspiracy to buy authorizing the court to admit evidence of the declaration bearing on payment (*cf. United States v. Geaney*, 2d Cir. 1969, 417 F.2d 1116, 1120) is without substance. The evidence just referred to made out appellants' complicity in the conspiracy by a fair preponderance of the evidence.

It is too easy to argue that the conspiracy was at an end when the object of the conspiracy as charged was realized in appellants' receipt and possession of the stolen property; the conspiracy that existed in fact, and which included the receipt and possession charged in Count One, the jury could find, embraced payment as its last term, and implied the need to identify the ones who were to pay. The evidence of Cogar, if believed, functioned to identify appellants as the persons Santa referred to as "the rabbis" connected with the highjacked Schick products, and to present Santa's statement that he was going to get from appellants "the *rest* of the money." The most obvious, although not the necessary, interpretation of the verdict of not guilty on the conspiracy count may well be that the jury did not believe Cogar. But the Court was not free to rule as a matter of law that the conspiracy did not include payment by appellants as a term (*cf. United States v. Jackson, supra*) or to rule that the conspiracy ended with the seizure and arrests. *United States v. Borelli*, 2d Cir., 336 F.2d 376, 389-390; *United States v. Frangese*, 2d Cir. 1968, 392 F.2d 954, 964; *United States v. Harris*, 7th Cir. 1976, 542 F.2d 1283, 1300-1301; *cf. United States v. Fischetti*, 5th Cir. 1971; 450 F.2d 34, 41; *United States v. Annunziato*, 2d Cir. 1961, 293 F.2d 373, 376-378. There was before the court, when the case went to the jury, not only Cogar's testimony, but the whole sequence of events including appellants' insistence to the FBI Agents that the Schick products were innocently warehoused under documents, however dubious, which they produced, and Pollari's testimony that Santa paid him and the De Fillippos the sum of $700.00 each on March

13th, after the seizure. There was no question of Santa's complicity in the conspiracy, and the Diamond declarations derived their significance only as they identified appellants as the persons with whom Santa was continuing to deal in connection with his disposition of the highjacked Schick products. That Diamond himself was a conspirator, the jury could find, followed from his participation in the conversation with Santa to which Cogar testified; he was not in those conversations a mere observer. It was not error for the court to rule, in ultimate substance, that the jury could find from the evidence, if they accepted it as truthful, that the declaration about obtaining payment from appellants, identified through the Diamond declarations, could be found to be in furtherance of the conspiracy, and that the conspiracy could be found to extend beyond the seizure and arrest and until the time when the March 14 conversation took place.

It is not necessary to consider whether the evidence was independently admissible on the substantive count, although it would appear no less admissible on the issue of knowledge (*cf. United States v. Wilson*, 7th Cir. 1974, 506 F.2d 1252, 1257), nor to consider whether, if it should not have been admitted, it was so prejudicial as to require reversal of the convictions. *Cf. United States v. Floyd*, 2d Cir. 1977, 555 F.2d 45; *United States v. Stanchich*, 2d Cir. 1977, 550 F.2d 1294, 1298-1300.

Judgments affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

. x

UNITED STATES OF AMERICA :
:
—against—
:
MANUEL V. GOMEZ, STANLEY DIAMOND, : 75 CR 762
VINCENT SANTA, FRANK JOSEPH : Memorandum
MALONEY, CHIAM KAHAN, SOLOMON : of Decision
WERCBERGER and MOR WERCBERGER, : and Order
: July 6, 1976
:

. x

MISHLER, CH. J.

Defendants Chiam Kahan, Solomon Wercberger and Mor Wercberger move pursuant to F.R.Crim.P. 41(f) to suppress certain evidence seized, pursuant to a search warrant on March 13, 1975, on the ground that the supporting affidavit fails to show probable cause. The affidavit of Patrick Colgan, special agent of the Federal Bureau of Investigation, states that he was advised that a truck carrying 6,910 cartons of Schick razors and toilet products was hijacked on March 11, 1975. A reliable informant advised Agent Colgan that he was at the CBS warehouse located at the foot of 50th Street in Brooklyn, New York on March 12, 1975, and "observed several thousand cartons of Schnick [sic] super two-bonded razors, bearing the Schnick [sic] Inc., Spec No. 02-40 on the cartons." The supporting affidavit claims, and the government concedes, that the designation "Spec No. 02-40" is not an inventory number identifying the goods, but, instead, the manufacturer's code number designating the type of goods packaged in the carton (i.e., Schick II razors and blades). Briefly, defendants' argument is that the information that thousands of cartons

of Schick razors and blades were seen in a warehouse on March 12, 1975 is not a sufficient basis for the reasonable belief that they were part of the same load of 6,910 cartons of Schick razors, blades, and toilet products hijacked the day before.[1]

Neither the reliability of the informant nor the reliability of the supplied information is challenged. *See Aguilar v. State of Texas*, 378 U.S. 108, 84 S.Ct. 1509 (1964), *Spinelli v. United States*, 392 U.S. 410, 89 S.Ct. 584 (1969). The question presented on this motion is whether the underlying facts in the affidavit (the hijacking of a truck containing thousands of cartons of Schick razors and toilet products on March 11, 1975, and the presence of several thousand of Schick razors at the warehouse searched on March 12, 1975), assuming them to be true, were sufficient to draw a reasonable inference that the razors at the warehouse were part of the hijacked load. *Vitali v. United States*, 383 F.2d 121 (1st Cir. 1967).

Affidavits supporting search warrants are to be tested and interpreted in a common sense and realistic manner. *United States v. Ventresca*, 380 U.S. 102, 85 S.Ct. 741 (1965). The facts and circumstances must do more than arouse a suspicion that contraband is on the premises, but it need not rise to the level of proof necessary to convict. *Brinegar v. United States*, 338 U.S. 160, 69 S.Ct. 1302 (1949). The issue is whether the goods seen by the informant were likely to be the goods stolen the previous day.

Defendant argues that these products are so common that they "could be observed in hundreds of thousands of places throughout the United States on that same day." (Affidavit by Steven Thal, p. 5). While possible, it is unlikely that many places would have thousands of cartons of Shick razors on hand. The affidavit established that the quantity of razors observed at the warehouse on the day following the hijacking was extraordinary.

The court finds that the affidavit sufficiently demonstrated probable cause to believe that the cartons of Schick

razors at the CBS warehouse were part of the load hijacked on March 11, 1975.

The motion to suppress is denied, and it is
SO ORDERED.

/s/ Jacob Mishler
U.S.D.J.

NOTE

[1]The affidavit states that the goods "were being shipped from Schnick [sic], Inc., West Haven, Conn. to Anahiem, California."

APPENDIX C

UNITED STATES COURT OF APPEALS
Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fifteenth day of May , one thousand nine hundred and seventy-eight.

Present:
HON. ELLSWORTH A. VAN GRAAFEILAND

HON. WILLIAM H. WEBSTER
Circuit Judges

HON. JOHN F. DOOLING
District Judge

United States of America,
Plaintiff-Appellee,

v.

Manuel V. Gomez, Stanley Diamond, Vincent Santa, a/k/a Jimmy Santa, Frank Joseph Maloney, Chaim Kahan, Solomon Wercberger, Mor Wercberger,
Defendants

Chaim Kahan, Solomon Wercberger,
Mor Wercberger,
Defendants-Appellants.

A petition for a rehearing having been filed herein by counsel for the defendants-appellants, Chaim Kahan, Solomon Wercberger and Mor Wercberger.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

A. Daniel Fusaro
Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fifteenth day of May, one thousand nine hundred and seventy-eight.

. x

United States of America,

Plaintiff-Appellee,

v.

Manuel V. Gomez, Stanley Diamond, Vincent Santa, a/k/a Jimmy Santa, Frank Joseph Maloney, Chaim Kahan, Solomon Wercberger, Mor Wercberger,

Defendants,

Chaim Kahan, Solomon Wercberger,
Mor Wercberger,

Defendants-Appellants.

. x

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendants-appellants, Chaim Kahan, Solomon Wercberger, and Mor Wercberger, and no active judge, or judge who was a member of the panel, having requested that a vote be taken on said suggestion.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

IRVING R. KAUFMAN
Chief Judge

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

. x

UNITED STATES OF AMERICA

AFFIDAVIT FOR A
SEARCH WARRANT

-against-

(T.18, U.S.C., 659)

PREMISES KNOWN AS CBS WAREHOUSE, INC., A MULTI-STORY RED BRICK BUILDING KNOWN AS BUILDING NO. 58 LOCATED AT THE FOOT OF 50TH STREET, BROOKLYN, NEW YORK

Defendant.

. x

EASTERN DISTRICT OF NEW YORK, SS:

PATRICK F. COLGAN, being duly sworn, deposes and says that he is a Special Agent of the Federal Bureau of Investigation, duly appointed according to law and acting as such.

Your deponent has reason to believe that there is presently being concealed in the above-described premises a quantity of cartons bearing the name Schnick, Inc., with the Spec. No. 02-40 on the said cartons which cartons have been stolen from Interstate Commerce in violation of Title 18, United States Code, Section 659.

The facts tending to establish the grounds for the issuance for a search warrant for the above-described premises are as follows:

(1) A communication to the Federal Bureau of Investigation from a Mr. James Lestar, an employee of Time-D.C. Trucking Corp., of Secaucus, New Jersey, that a trailor owned and operated by Time-D.C. Trucking Corp., and bearing California License Plate No.: WY6336 was

hijacked on March 11, 1975. Mr. Lestar further advised taking from the trailor 6,910 cartons of Schnick razors and toliet products which cartons were being shipped from the Schnick, Inc., West Haven, Conn. to Anahiem, California.

(2) A reliable confidential informant, who has previously supplied information to the Federal Bureau of Investigation which information has resulted in the arrest of one individual for the theft of approximately Seventy-Five Thousand Dollars ($75,000) worth of stolen merchandise and who's information has also lead to the recovery of approximately Twenty-Five Thousand Dollars ($25,000) worth of hijacked property and the arrest of two individuals in connection with that hijacking has stated, that he was in the above-described premises known as CBS Warehouse on March 12, 1975. While in the above-described warehouse the reliable informant observed several thousand cartons of Schnick super two bonded razors bearing the Schnick, Inc., Spec. No. 02-40 on the cartons.

WHEREFORE, your deponent respectfully request that a search warrant be issued authorizing Special Agents of the Federal Bureau of Investigation to enter in day the premises known as CBS WAREHOUSE, INC., A MULTI-STORY RED BRICK BUILDING KNOWN AS BUILDING NO. 58 LOCATED AT THE FOOT OF 50TH STREET, BROOKLYN, NEW YORK, and there to search and seize the above-described property to the end that the same may be dealth with according to law.

Patrick F. Colgan, Jr.

Sworn to before me this
13th day of March, 1975

VINCENT A. CATOGGIO
UNITED STATES MAGISTRATE
EASTERN DISTRICT OF NEW YORK

Supreme Court, U. S.
FILED
AUG 28 1978
MICHAEL RODAK, JR., CLERK

No. 77-1772

In the Supreme Court of the United States

OCTOBER TERM, 1978

CHAIM KAHAN, SOLOMON WERCBERGER, AND MOR WERCBERGER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
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PHILIP B. HEYMANN,
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In the Supreme Court of the United States

October Term, 1978

No. 77-1772

CHAIM KAHAN, SOLOMON WERCBERGER, AND MOR WERCBERGER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 572 F. 2d 923. The opinion of the district court (Pet. App. B) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 7, 1978. A petition for rehearing with a suggestion of rehearing *en banc* was denied on May 15, 1978. The petition for a writ of certiorari was filed on June 14, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether evidence seized in a search of petitioners' warehouse pursuant to a search warrant should have been suppressed on the ground that the affidavit upon which the warrant was issued contained a misstatement of fact.

2. Whether the facts stated in the affidavit furnished probable cause for the search.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioners were each convicted of receiving more than 5,072 cartons of Schick shaving products which had been stolen while being transported in interstate commerce, in violation of 18 U.S.C. 659.[1] Petitioners were each sentenced to three years' imprisonment. The court of appeals affirmed (Pet. App. A).

1. The facts are set forth in the opinion of the court of appeals (Pet. App. 2a-10a). Briefly, at approximately 9:00 p.m. on March 11, 1975, a Time D.C. tractor-trailer carrying 6,910 cartons of Schick products was hijacked near the junction of Routes 80 and 287 in Jew Jersey. The next day, portions of the stolen goods were delivered to the S&F Warehouse and the CBS Warehouse, in Brooklyn, the latter of which was operated by petitioners.[2] The following day, additional portions of the

[1]Petitioners were acquitted of conspiracy to receive and possess the same goods. Prior to trial, co-defendant Stanley Diamond pleaded guilty to the conspiracy charge. Co-defendants Vincent Santa and Manuel Gomez were tried separately, together with Joseph DeLuca, James DeFillippo and Patrick DeFillippo, on a superseding indictment. All five were convicted of possession of the stolen property and conspiracy.

[2]Kahan, Mor Wercberger, and Solomon Wercberger were, respectively, the president, treasurer, and secretary of CBS Warehouse Inc.

hijacked load were delivered to the CBS Warehouse, which was by that time under F.B.I. surveillance. All three petitioners participated in the unloading of the stolen property. After the unloading had been completed, F.B.I. agents, acting pursuant to a search warrant, entered the warehouse and seized the hijacked goods.

2. The affidavit in support of the search warrant (Pet. App. E) stated that 6,910 cartons of Schick razors bearing the product specification number 02-40 had been hijacked on March 11, 1975, and that on March 12, 1975, a reliable informant had observed several thousand Schick cartons bearing the number 02-04 at the CBS Warehouse. Petitioners moved to suppress the evidence seized in the search on the ground that the affidavit failed to establish probable cause. This motion was denied (Pet. App. B).

In preparing for trial, the government discovered that the affidavit was inaccurate. The informant, who had participated in delivering the stolen goods to S&F Warehouse on March 12, 1975, had not been in the CBS Warehouse on that day, but rather had been told by others involved in disposing of the property that a load was being delivered to the CBS Warehouse. The government informed the trial judge of the inaccuracy (C.A. App. 172a-174a)[3], and a hearing was held. F.B.I. Agent Robert Pecoraro testified at the hearing that the informant had called him late in the evening of March 12, 1975, and had told him that he had participated in the unloading of the hijacked goods. When Agent Pecoraro asked the informant where the goods were then located, the informant said (C.A. App. 252a), "It's on the location in Brooklyn. We took two loads out today, we took one

[3]"C.A. App." refers to the appendix filed by petitioners in the court of appeals.

to CBS Warehouse and took two to Brooklyn Navy Yard to S&F." On cross-examination (C.A. App. 262a-263a), defense counsel asked whether the informant had said that "he had taken the load to CBS Warehouse," and Pecoraro replied, "Sir, that is the way I understood the conversation to go." Following the hearing, the court held that the inaccuracy in the affidavit did not warrant suppression of evidence (C.A. App. 268a-269a).

ARGUMENT

1. Petitioners contend (Pet. 7-10) that the district court should have suppressed evidence seized in the search of the CBS Warehouse on the basis of the inaccurate representation in the affidavit that the government's informant had personally observed several thousand cartons of Schick products in the warehouse.

In *Franks* v. *Delaware*, No. 77-5176, decided June 26, 1978, this Court held that inaccuracies in search warrant affidavits of probable cause require suppression of evidence only if they are material to the existence of probable cause *and* if they are made intentionally or in reckless disregard of their truthfulness.[4] Under this standard, the district court's refusal to suppress evidence was proper.[5] The informant's lack of precision in the description of his activities is not grounds for suppression of evidence. See *Franks* v. *Delaware*, *supra*, slip op. 8-9; *Rugendorf* v. *United States*, 376 U.S. 528, 532. Petitioners

[4]In view of the decision in *Franks*, there is no longer any need for this Court to resolve the differences which previously existed among the courts of appeals as to what types of false statements in affidavits of probable cause require suppression of evidence (*see* Pet. 7-8).

[5]In *Franks*, the Court also considered the question of when a defendant is entitled to an evidentiary hearing on allegations that an affidavit of probable cause contains false information. Since there was a hearing in the district court, this question is not involved here.

allege no more than simple negligence on the part of the F.B.I. agent, whose conclusion that the informant had been present in the CBS Warehouse was drawn from the informant's statement that "we took [a load] to CBS Warehouse" (pp. 3-4, *supra*). Even if the agent was negligent in failing to make further inquiry of the informant, his failure to ascertain the facts accurately was surely neither intentional nor reckless.

In view of the absence of evidence of intentional or reckless misrepresentation, there is no occasion for this Court to consider in this case the question whether, in determining the materiality of the false statement, the district court should have simply deleted the false statement instead of substituting for it the fact that the informant had been told by others handling the stolen property that a load was being taken to the CBS Warehouse (*see* C.A. App. 269a).

2. Petitioners contend (Pet. 11-14) that the affidavit fails to establish probable cause to believe that the Schick cartons in the CBS Warehouse were part of the hijacked load. This argument is in large part based upon the fact that the number 02-40, which appeared on the cartons, identified the product and not the hijacked shipment.

Petitioners' argument was properly rejected by both the district court (Pet. App. B) and the court of appeals (Pet. App. 10a-13a), and further review is not warranted. Although the fact that the number 02-04 appeared on the cartons was not conclusive that they had been stolen, it did substantially increase the likelihood that they were part of the hijacked cargo in light of the proximity of time and place.[6] As the district court reasoned (Pet. App. 27a):

[6]The court of appeals properly distinguished *United States* v. *Roth*, 391 F. 2d 507 (C.A. 7), cited by petitioners (Pet. App. 13a n. 5). In

Affidavits supporting search warrants are to be tested and interpreted in a common sense and realistic manner. *United States* v. *Ventresca*, 380 U.S. 102, 85 S.Ct. 741 (1965). The facts * * * [recited] must do more than arouse a suspicion that contraband is on the premises, but [they] need not rise to the level of proof necessary to convict. *Brinegar* v. *United States*, 338 U.S. 160, 69 S.Ct. 1302 (1949). The issue is whether the goods seen by the informant were likely to be the goods stolen the previous day.

Defendant argues that these products are so common that they "could be observed in hundreds of thousands of places throughout the United States on the same day." (Affidavit by Steven Thal, p. 5). While possible, it is unlikely that many places would have thousands of cartons of Schick razors on hand. The affidavit established that the quantity of razors observed at the warehouse on the day following the hijacking was extraordinary.

See *Vitali* v. *United States*, 383 F. 2d 121, 122 (C.A.1).

Roth, the court held that an affidavit in support of a warrant authorizing seizure of a stolen shipment of Hamilton Beach Blenders did not establish probable cause for the search.

The search warrant affidavit in the case stated in pertinent part: "That your affiant has been informed by Thomas Noonan, a Special Agent of the Federal Bureau of Investigation, that Agent Noonan personally observed a large number of boxes bearing the name 'Hamilton Beach' in the premises above-described, and that such boxes were observed through a window by Agent Noonan while he was standing in a public parking lot adjacent to said building." Thus, unlike the affidavit in this case, the *Roth* affidavit specified "[n]either the date on which Noonan observed the defendant's premises nor the *type of* * * * products * * * observed" (391 F. 2d at 511; emphasis added).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Supreme Court, U. S.
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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY MEMORANDUM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY MEMORANDUM

---

1. In our initial brief, we contended, *inter alia*, that the recitals in the affidavit in support of the search warrant in this case were clearly insufficient under the established Fourth Amendment standards for probable cause. Pet. at 11-14. Although our first argument — filed prior to this Court's ruling in *Franks v. Delaware*, 98 S. Ct. 2674 (1978) — focussed on the standard of culpability required to invalidate a warrant based upon a false affidavit, our alternative argument — that the affidavit was inadequate on its face, even apart from its falsity — was equally compelling. The government's response asserts that the first issue need "no longer" be resolved in light of the *Franks* decision. Brief in Opp. at 4 n.4. It then asserts, in totally conclusory terms, that the affidavit was sufficient under the "common sense and realistic" test of *United States v. Ventresca*, 380

U.S. 102 (1965). *Id.* at 5-6. A precise examination of the facts refutes the government's assertion.

2. The factual recitals set forth in the warrant to search petitioners' warehouse — reduced to their relevant essentials — established only that on March 11, 1975, 6,910 cartons of Schick razors and toilet products were stolen while being shipped from Schick, Inc., West Haven, Connecticut, to Anaheim, California, and that on March 12, 1975, a "reliable informant observed several thousand cartons of Schick super two bonded razors bearing the Schick, Inc., Spec. No. 02-40 on the cartons." Pet. App. E at 32a-33a. Despite the government's contention to the contrary,[1] absolutely nothing in the affidavit connected even the specification number alleged to have been on the cartons in the petitioners' warehouse with the stolen Schick razors and toilet products. Moreover, the government agrees that the specification number itself only "identified the product and not the hijacked shipment." Brief in Opp. at 5.

[1]The government in its statement of facts asserts that the affidavit supporting the search warrant: "stated that 6,910 cartons of Schick razors bearing the product number 02-40 had been hijacked on March 11, 1975 . . ." Brief in Opp. at 3. This is not so. In the portion of the affidavit setting forth "the facts tending to establish the grounds for the issuance for a search warrant . . ." the sole description of the goods which the FBI was told were stolen is that of "6,910 cartons of Schick razors and toilet products which cartons were being shipped from the Schick, Inc., West Haven, Connecticut to Anaheim, California," Pet. App. E at 32a-33a. The deponent in the affidavit recites in a preliminary paragraph that he "has reason to believe that there is presently being concealed in [petitioners'] premises a quantity of cartons bearing the name Schick, Inc. with the Spec. No. 02-40 on the said cartons *which cartons have been stolen from interstate commerce in violation of Title 18, United States Code Section 659.*" But there is not a single factual recital anywhere in the affidavit supporting any basis for believing that the stolen merchandise itself had the Spec. No. 02-40. And the affidavit was the *only* evidence submitted to the magistrate who issued the warrant. Appellant's App. at 125a. Therefore, the warrant must stand or fall solely on the contents of the affidavit. *See* Pet. at 11, and cases cited therein.

In *Franks v. Delaware*, 98 S. Ct. 2674, 2681 (1978), this Court spoke of the requirement that "a warrant affidavit . . . set forth particular facts and circumstances underlying the existence of probable cause, so as to allow the magistrate to make an independent evaluation of the matter." In the context of a search warrant alleging the presence of stolen goods there must be particular facts to believe that the goods thought to be present at the location to be searched are, in fact, those which were stolen. *See* Pet. at 11, 13. The government argues here that the affidavit did make the requisite connection between the goods on the premises to be searched and the goods actually stolen by virtue of "the proximity of time and place" (Brief in Opp. at 5), the assertion that "the quantity of razors observed at the warehouse on the day following the hijacking was extraordinary" (*id.* at 6, *quoting from* opinion below), and the reference in the affidavit to the "type" of "products" (*id.* at 5-6 n.6, *quoting from United States v. Roth*, 391 F.2d 507, 511 (7th Cir. 1968)).

But nothing in the affidavit established "proximity of place." The sole geographic reference for the place of theft given by the affidavit was the statement that the goods were stolen while "being shipped from the Schick, Inc. West Haven, Conn. to Anaheim, California." Pet. App. E at 33a. The report of theft came from an employee of the trucking company located in Secaucus, New Jersey, but nothing in the affidavit established that the theft itself occurred in New Jersey.[2]

[2]Even if the reference to the location of the reporting employee is taken as establishing the location of the theft, that only means that the geographic range established on the face of the affidavit was limited to the area between Secaucus, New Jersey and Brooklyn, New York. That geographic range encompasses one of the largest and most densely populated commercial and metropolitan regions of the country; since the product in question (*i.e.*, Schick razors) is a widely distributed and nationally advertised product, such a geographic range hardly constitutes "proximity of place."

Nor did anything in the affidavit establish that "several thousand cartons of Schick" razors constituted an "extraordinary" number of razors to find in a warehouse. Indeed, in the instance of a nationally distributed and nationally known brand of products such as Schick razors, one would expect to find several thousand cartons of Schick razors located in many different distribution locations in every metropolitan region of the country. Obviously, if 6,910 cartons of Schick razors were being shipped from West Haven, Connecticut, to Anaheim, California, they were to be stored in a warehouse at their ultimate destination. Would their presence at that intended warehouse have been sufficiently "extraordinary," standing alone, to justify a search of those premises based on a report of theft of several thousand cartons of Schick razors somewhere else in California?

Finally, the assertion of significant "proximity of time" has no significance in light of the fact that the warehouse here in question was in a large metropolitan area. Simply put, it is a safe assumption that the day after the hijacking in question, there were many locations in the Greater New York — New Jersey metropolitan area having "several thousand" cartons of Schick razors. If the court of appeals in this case is right, every single one of those locations was subject to a search without any further factual recital in the supporting affidavits.

3. The government's attempted distinction of *United States v. Roth*, 391 F.2d 507 (7th Cir. 1968), fails. *See* Brief in Opp. at 5-6 n.6. In *Roth*, approximately 3,000 Hamilton Beach blenders were stolen on or about October 29, 1965. 391 F.2d at 508. According to the FBI agent's affidavit, on October 31, 1965, he was informed by a confidential informant that "*the said electric blenders* [the stolen items]" were on the premises. *Id.* at 509. It actually turned out that the informant had said there was "a load of Hamilton Beach *products*" on the premises. *Id.* The *Roth* court thus

carefully scrutinized the remainder of the affidavit to see if sufficient particularity was present to connect the goods described on the premises to be searched with the goods alleged to have been stolen. In the course of distinguishing this Court's earlier decision in *Ventresca v. United States*, 380 U.S. 102 (1965), the *Roth* court stated: "Neither the date on which Noonan observed the defendant's premises nor the type of Hamilton Beach products he observed was recited in the affidavit." 391 F.2d at 511. This is the portion of the opinion extracted in the government's opposition brief in this case at footnote 6. But the *Roth* court went on to observe:

> Both of these omissions are highly critical in view of the nature of the premises, a "garage-type warehouse," and the type of merchandise stolen, a product that is mass produced by a nationwide manufacturer of a variety of household electrical appliances. Without detailing the date of Noonan's [*i.e.*, the FBI agent's] observation and what he specifically saw, Morrison's [*i.e.*, the affiant's] statement might have described any of a large number of warehouses that had received a shipment of Hamilton Beach products prior to or contemporaneously with the theft of the blenders in question. The statement, therefore, is too imprecise to establish probable cause that what Noonan observed on the defendant's premises was the stolen blenders.

Id.

Hamilton Beach blenders are, of course, "a product that is mass produced by a nationwide manufacturer." Hence the magistrate applying the Fourth Amendment would not have been able to distinguish the "garage-type warehouse" the FBI wanted to search from the many other similar locations legitimately possessing a large quantity of Hamilton Beach blenders. The court in *Roth* was demand-

ing not merely a generic description of the type of mass-produced and mass-distributed product which was stolen, but some sort of specific product identification connecting the goods on the premises with "the stolen blenders." *Compare United States v. Ventresca*, 380 U.S. 102 (1965). This is precisely what the government concedes is lacking in the instant case.

4. The government also fails even to discuss *United States v. Galante*, 547 F.2d 733 (2d Cir. 1976), *cert. denied*, 431 U.S. 969 (1977), relied upon in our petition at page 13. In *Galante*, the affidavit in support of the search warrant recited the respective dates of the theft and the observation of the goods in question on the premises to be searched as well as product-type of the goods stolen and the goods observed on the premises in question (*i.e.*, Nikkor Camera Lens). *See* 547 F.2d at 736 n.1. Applying its prior decision in *United States v. Karanthanos*, 531 F.2d, (2d Cir.) *cert. denied*, 428 U.S. 910 (1976), the *Galante* court stated that the search was conducted under an invalid warrant, "a point conceded by the government" because the affidavit fails to "set forth the basis upon which the informant believes the activity to be criminal." *See* 547 F.2d at 736 n.1. Although the *Galante* court went on to affirm the conviction on the theory that the chain of causation between the search of the premises and the ultimate seizure of the goods was broken by a number of independent intervening causes, it is apparent that in *Galante* at least the court believed the affidavit itself insufficient under Fourth Amendment standards to establish probable cause.

CONCLUSION

We believe the government has failed to produce a single case which fairly supports the affidavit which the lower court here sustained.[3] For the reasons stated herein and in our original petition, the writ of certiorari should be granted.[4]

Respectfully submitted,

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[3]The only other case on which the government significantly relies on this point is *Vitali v. United States*, 383 F.2d 121, 122 (1st Cir. 1967). We believe we have distinguished *Vitali* in our original petition at page 13.

[4]At the very least, this case should be vacated and remanded in light of this Court's decision in *Franks v. Delaware*, 98 S. Ct. 2674 (1978). This Court held in *Franks* that affidavits containing material misstatements of fact made deliberately or with reckless disregard for the truth are invalid under the Fourth Amendment. Here the court of appeals noted the district court's finding of non-negligence in making the misstatement, but carefully confined its own opinion to the conclusion that "the record requires the conclusion that the misstatement was not intentional" and that "negligence or, very likely, something going beyond simple negligence" is necessary to invalidate a warrant. *See* Pet. App. E at 16a-17a. We think the issue of possible recklessness is thus left open under the court of appeals opinion, an issue fairly encompassed by Petitioner's briefs below. *See* Reply Brief for Defendants-Appellants In No. 77-1216 at 16-20.